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No. 84-1359

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JACKIE COLLINS LERMAN,

Petitioner,

v.

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

This memorandum is respectfully submitted on behalf of respondent Flynt Distributing Company, Inc. in opposition to the petition of Jackie Collins Lerman for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

COUNTER-STATEMENT OF THE CASE

Petitioner Lerman, internationally renowned as "Jackie Collins" ("Collins"), the best-selling authoress of sexually explicit novels and film screenplays, and an outspoken advo-

cate of sexual equality in the film arts ("Equal Nudes For All"), seeks review of the judgment of the Court of Appeals dismissing her action against respondent for invasion of privacy under New York Civil Rights Law §§ 50 and 51, arising out of the misdescription of Collins as an actress appearing nude in, rather than as authoress of, the film "*The World is Full of Married Men*" ("*Married Men*").

Petitioner is a "celebrity-author" whose *nom de plume* and picture have appeared on more than 9 million copies of her (8) best-selling books, which have been published in 32 countries throughout the world.[1] As an actress, she has appeared in 3 plays, 40 to 60 television shows and 30 films. As an authoress and advocate for sexual equality, she has given "hundreds" of interviews to the media, *inter alia*, espousing her "personal philosophy" on nudity and "the double standard in this country" (i.e., the United States). A partial compilation of the press materials distributed by and with respect to petitioner, and many articles about her which have appeared in the *celebrity* and *gossip* column sections of American newspapers and magazines is reproduced in respondent's appendix, *infra*, at RA 1-2.

One such interview appeared in *Penthouse* magazine, another in *Swank*; both of these "men's" magazines feature nude females in various poses. Petitioner had no objection to being publicized in *Penthouse* (or *Swank*), but objects to the *reference* to Collins in *Adelina* because of the false light in which she is portrayed.

In 1968, Collins authored the book *Married Men* and she subsequently wrote the screenplay for the film, which was produced by her husband, Oscar Lerman. In August, 1979, the Italian magazine, *Playmen*, originally published the article

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1 In the year prior to the trial, Lerman "was the third highest selling novelist in the United States" as a consequence of the extraordinary success of *Chances*, the novel she was in the midst of writing when the publications complained of occurred.

complained of, a serious essay on the emerging freedom on actresses to appear in the nude in American films. Petitioner omits the text of the article from her appendix; respondent has accordingly reproduced the text in its appendix, *infra*, at RA 3-4. The essay was accompanied by captioned photographs of several actresses, and included outtakes from the set of *Married Men* featuring a simulated orgy scene and a photograph of an actress nude from the waist up. The caption accompanying these two photographs misidentifies the author of *Married Men* as Jacqueline Susann and "Jackie Collins" as the otherwise unidentified actress whose picture is shown. Petitioner never complained to *Playmen* or took legal action against it on account of the misdescription of "Jackie Collins", nor did she attempt to prove in this case how or why the original error was made.[2]

The *Playmen* article was republished in the United States in the May 1980 issue of *Adelina* magazine, which repeated *Playmen's* misidentification of Collins.[3] Although petitioner received an advance copy of the magazine in February, 1980, and was aware of the misidentification of Collins, she did not contact either *Adelina's* publisher, Chuckleberry Publishing, Inc. ("Chuckleberry"), or its national distributor, Publishers Distributing Company, Inc. ("PDC"), and took no action whatsoever for several weeks, apparently deliberately delaying until the last day prior to the March 25, 1980 "on-sale" date of the magazine, when she commenced an action against Chuckle-

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2 The District Court summarized the publisher's explanation for the error in its July 31, 1980 Opinion (38a, at 40a), as follows:

> Chuckleberry's Italian licensor purportedly obtained the photographs and text in precisely the form in which they appear in *Adelina* from the Luxembourg office of Media Press International ("MPI"), a public relations firm. *The material allegedly was received and distributed by MPI in connection with the promotion of the film The World Is Full of Married Men.* [Emphasis Added.]

3 *Adelina* is the "English language version of *Playmen*." *See, Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563, 564-65 (2d Cir. 1982).

berry and PDC, obtaining a preliminary injunction against further sale or distribution of the magazine.

By written agreement dated March 17, 1980, respondent purchased PDC's *magazine distribution business*, with financial adjustments retroactive to February 29, 1980, but with PDC contractually obligated to continue to operate the business until at least April 11, 1980. In fact, PDC continued to operate the business until August, 1980, when its New York office was closed and functions transferred to respondent's California office. *Consistent with the standards of the magazine industry*, neither PDC nor FDC had any advance knowledge or control over the content of any issue of *Adelina* and their publication dissemination function *as national distributor* was limited to supplying the publisher's printer with a computerized list of magazine wholesalers to which the magazines were to be shipped—a function performed independently and well in advance of the printing and physical distribution of the magazines. In short, respondent, like any *national distributor*, at no time in this litigation had any advance knowledge of the content of any of the issues sued upon (including the publisher's subscription solicitation page), let alone knowledge of the use of the name "Jackie Collins".

PDC fully complied with the preliminary injunction, including transmitting telegrams to its more than 500 nationwide wholesale customers in accordance with explicit instructions of the District Judge, informing its wholesalers of petitioner's suit and the preliminary injunction, and requesting that all unsold copies of the disputed magazine be returned. Ultimately, over 84% of the magazines were in fact returned.

The cover of the May 1980 issue of *Adelina*, which mistakenly referred to Collins "in the nude", was reduced to 1/8th its original size and reprinted by Chuckleberry in the June 1980 and January 1981 issues of *Adelina* as part of the publisher's subscription solicitation page contained in each issue.[4] Copies of these advertisements are reproduced *infra*, at

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4 The national distributor has *no* financial interest whatsoever in the publisher's subscription solicitation or any revenue thereby derived by the publisher.

RA 5-6. Collins' name, reduced proportionately in size, is "miniscule" and difficult to read at best. Collins made no effort to prove at trial how or why the May cover appeared in the publisher's June or January subscription advertisements, and the record clearly establishes (i) that the national distributor (PDC) would have furnished the publisher's printer with the galley (i.e., list) of wholesalers for the June 1980 issue by the first week of March, 1980 [i.e., approximately two (2) weeks prior even to respondent's March 17, 1980 purchase of PDC's business] and (ii) that the content for the June issue (with respect to which respondent had no knowledge or control) would have already been at the printer substantially prior to March 24, 1980 (when Collins commenced her action against distribution of the May issue), *for shipment of the June 1980 issue began on that date.*

Prior to trial, (i) Chuckleberry filed for reorganization under Chapter XI of the bankruptcy law and petitioner's complaint against it was stayed, (ii) petitioner settled with and was paid $100,000 by PDC, more than adequately compensating her for her alleged damages, which she grossly failed to prove at trial, and (iii) the District Court granted partial summary judgment for petitioner on her invasion of privacy claims, in effect stripping respondent—one of seven *national magazine distributors* and a classic "*media defendant*"—of First Amendment protection against petitioner's New York statutory claims.

At trial, petitioner abjectly failed to prove either (i) the substantial damages alleged by her, (ii) any knowledge, control, responsibility or involvement whatsoever by respondent (or its predecessor, PDC) in the selection of the content of any of the three magazines in issue, or (iii) malice against Collins in any form whatsoever. Moreover, on cross-examination petitioner repeated her pre-trial "public figure" admissions, conceding that she is an accomplished actress, as well as an authoress; had voluntarily given as many as 500 published interviews prior to the trial; had, in addition, appeared on numerous television and radio shows, and espoused in interviews, as well as her writing, her "personal philosophy" regarding the "double standard" and her concept of "equal nudes for all."

Recognizing respondent's total lack of involvement, the District Court refused to submit Collins' claim for punitive damages with respect to the May 1980 issue of *Adelina* to the jury "since FDC had no knowledge that plaintiff's name or picture would appear in the May 1980 issue," however, it did charge as to punitive damages with respect to the June 1980 and January 1981 issues, which were allegedly distributed after the commencement of Lerman's action.[5]

Notably, although petitioner now claims that she "did not pursue discovery and proof of 'actual malice' " [Petition, at 20], she in fact (i) engaged in substantial pre-trial discovery, (ii) requested a malice charge to the jury (reproduced, *infra*, at RA 7) and (iii) her counsel devoted a substantial portion of his summation to pursuading the jury that FDC's principal (who played no role in the facts of the case and whose name was obviously mentioned soley to inflame the passion and prejudice of the jury) had acted maliciously in failing to take steps to prevent the republication of petitioner's name in the June and January issues of *Adelina*. As found by the Court of Appeals, however, there was "simply no evidence—which plaintiff had every incentive to develop to obtain punitive damages—that any Flynt Distributing employee was aware that the publisher's errors would reoccur." (33a)

Obviously prejudiced in the extreme by petitioner's counsel's summation—a virtual replay of his grossly improper summa-

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5 As previously explained, the national distribution function for the June 1980 issue of *Adelina*—furnishing of the list of wholesalers to the printer—was complete some three (3) weeks before Lerman commenced her action. In the case of the January 1981 issue, petitioner completely failed to demonstrate that there was any reason for respondent's employees to anticipate the republication of the subscription solicitation page, especially since petitioner did not bring the June 1980 issue to any party's attention until March 1981, nearly six (6) months after respondent had completed its dissemination function with respect to that issue and approximately five (5) months after the January issue went on sale in November, 1980. Respondent, therefore, was completely unaware of, and had no reason to suspect or anticipate, the inclusion of the May 1980 cover in the June 1980 subscription solicitation, and had absolutely no reason to suspect or anticipate that the same subscription solicitation (which was not utilized by the publisher at any other time) would be republished in the January 1981 issue.

tion in *Guccione v. Hustler Magazines, Inc., et al.*, 7 Med. L. Rept. 2077 (Ohio Ct. App. 1981), *cert. denied*, 459 U.S. 826 (1982)—the jury returned its verdict, awarding petitioner $800,000 in compensatory damages with respect to the May 1980 *Adelina*, $1.2 million in compensatory and $1 million in punitive damages with respect to the June issue, and $5 million in compensatory and $32 million in punitive damages on account of the January 1981 issue, a total of $40 million.

Following remittitur of the judgment to $10 million (by reduction of the $32 million in punitive damages with respect to the January 1981 issue to $2 million), respondent (joined by the International Periodical Distributors Association, Inc., the American Booksellers Association, Inc., the National Association of College Stores, and the Periodical And Book Association of America, Inc., as *amici curiae*) appealed to the Court of Appeals for the Second Circuit, which unanimously *reversed* the judgment in a lengthy, detailed and scholarly opinion by Circuit Judge Cardamone. Petitioner's motion for rehearing in banc was denied and her petition for certiorari belatedly ensued.

Significantly, in light of petitioner's present plea for a new trial, her motion for rehearing in banc—filed after the Court of Appeals panel majority had ordered her complaint dismissed—failed to point to any additional evidence of actual malice which petitioner hoped to adduce, although petitioner at that point had every incentive to reveal any conceivable evidence or theory in this regard in order to obtain in banc relief.

Indeed, there is no evidence—clear and convincing, or otherwise—which petitioner could introduce which would show actual malice, since the evidence is uncontroverted that respondent had no prior knowledge of the contents sued upon, let alone knowledge of the misidentification of Collins at the time respondent (or PDC) merely performed the *national distribution function* for each issue of the magazine in question—i.e., at the time it transmitted the list of wholesalers to the publisher's printer. There is thus no basis upon which even a properly instructed jury could reasonably hold respondent liable to petitioner.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals did *not* "ignore the teaching of *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)," as claimed by petitioner. [Petition, at 8] To the contrary, the Court of Appeals expressly recognized the "limited First Amendment protection afforded [to commercial appropriations] under *Zacchini*" but, after carefully analyzing petitioner's complaint and proof, correctly concluded that "*Lerman's action presents a classic false light claim*" (emphasis added) subject to the requirement that she prove actual malice in accordance with *Time, Inc. v. Hill*, 385 U.S. 374 (1967). (20a)

There is simply no factual or analytic relationship between *Zacchini*, in which a famous circus performer sought to protect his property interest in his performance [an interest which the Court characterized as "focusing on the right of the individual to reap the rewards of his endeavors and having little to do with protecting feelings or reputation" (433 U.S. at 573)] and *Lerman*, in which petitioner vigorously claimed she is a private person, has never appeared nude publicly, and was defamed by the article complained of, allegedly suffering mental distress and humiliation. The gravamen of petitioner's complaint was clearly that she was portrayed in a false light—i.e., as a nude actress rather than as the authoress of the screenplay for the film in which the nude actress appears—and she failed even to "establish a *prima facie* cause of action for violation of her right to publicity." (19a)

Petitioner is thus clearly incorrect in her assertion that "the commercial exploitation here is far closer to *Zacchini* than to *Hill*." *Compare*, Restatement (Second) of Torts, § 652C ("Appropriation of Name or Likeness") *with* § 652E ("Publicity Placing Person in False Light"). *See, generally*, W. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

Likewise fallacious is petitioner's totally unsupported claim that "this case cries out for definition and guidance from this Court so that lower courts do not continue to apply the doctrine of *Time, Inc. v. Hill* in such an expansive manner as to undermine the individual's right to be free from commercial exploitation." [Petition, at 13]

Petitioner refers to *no* lower court decision which has misapplied the teaching of *Time, Inc. v. Hill, supra*, in such a manner, nor can she support her theorem that the mere misdescription of her in and on the cover of a magazine offered for sale to the public *ipso facto* constitutes a "commercial appropriation", for if this were the standard, there would be *no* inaccurate use of any person's name by the commercial print media which would remain protected under *Time, Inc. v. Hill*. Here, moreover, the facts plainly establish that there was *no* "commercial appropriation" of petitioner's pseudonym and, to the contrary, there was merely editorial error by the original publisher (perhaps even originating with the publicist for petitioner's movie; see n. 2, *supra*), repeated by Chuckleberry, which resulted in Collins' relationship with *Married Men* being mischaracterized and petitioner thereby portrayed in a "false light"—as nude and participating in a simulated movie orgy, rather than as the authoress of the screenplay featuring such nudity and simulated sex—from which all of petitioner's complaints flow.

Moreover, the New York courts have uniformly rejected petitioner's argument in construing and applying Civil Rights Law §§ 50 and 51, under which Collins' claims arise, in light of both the New York State and Federal constitutional guarantees of free speech and press. *See, Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440-442, 449 N.Y.S.2d 941, 944-45 (1982) (. . . "[The] narrow reading of the statutory provisions [§§ 50 and 51] has not been without sensitivity to the potentially competing nature of the values the Legislature, on the one hand, served by protecting against the invasion of privacy for purposes of "advertising" or "trade" and, on the other, the

values our State and Federal Constitutions bespeak in the area of free speech and free press. * * * . . . [O]ther than in the purely commercial setting covered by Sections 50 and 51, an inability to vindicate a personal predilection for greater privacy may be part of the price every person must be prepared to pay for a society in which information and opinion flow freely.") *Accord, Davis v. High Soc. Magazine, Inc.*, 90 A.D.2d 374, 457 N.Y.S.2d 308 (2d Dept. 1982), *appeal dismissed*, 58 N.Y.2d 1115 (1983).

Finally, we note that while petitioner principally relies upon *Zacchini* in her last-ditch effort to avoid dismissal of her case, this is a position she has vaulted to prominence only belatedly in an attempt to pique the interest of this Court. In her Court of Appeals brief, *Zacchini* was mentioned but *once, in passing* [". . . and the Supreme Court has recognized that commercial appropriation enjoys no special First Amendment privilege. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)."] and *not at all* in her petition for rehearing in banc, in which petitioner argued that the Court of Appeals had misapplied the "relationship" test of *Arrington, supra*, but conspicuously failed to make any argument predicated on what she now characterizes as "ignor[ing] the teaching of *Zacchini*."

Indeed, the transcript of the argument in the Court of Appeals reveals that in discussing the eleven (11) different cases relied upon and/or distinguished by petitioner's counsel during oral argument, there was *not one reference to Zacchini*. Especially telling in this regard was counsel's response to Judge Cardamone's pointed inquiry: "How do you distinguish this case from the rationale of *Time v. Hill*?" Unable to do so, counsel did *not* distinguish *Time, Inc.* by reliance on—or even mention of—*Zacchini*, but instead launched into a complex and obviously prepared "illustration", citing and comparing *Arrington, Time, Inc. v. Hill, Davis* and a pre-*New York Times v. Sullivan* case, *Thompson v. Close-Up*. The full colloquy is reprinted *infra*, at RA 8. Again, however, *conspicuously absent from counsel's presentation was any reference to or reliance upon Zacchini*, only now, disingenuously claimed to be not only relevant but controlling.

II.

The categorization of Collins as a "limited purpose public figure" by the Court of Appeals, with respect to the on-going public debate over "the propriety of female or male nudity in films and in the print media generally," is completely consistent and does not conflict with *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Readers' Digest Ass'n*, 443 U.S. 157 (1979).

The plaintiffs in each of these cases were indisputably *non-celebrities*, who—*unlike petitioner*—did not actively seek media attention in order to promote themselves and their "personal philosophy" to the public-at-large. Mrs. Firestone was simply a wealthy individual involved in a well-publicized divorce, nothing more. 424 U.S. at 453. Mr. Hutchinson, one of countless recipients of federal grant monies, likewise had virtually no "public profile" prior to the events he complained of. 443 U.S. at 134-36. Similarly, Mr. Wolston was totally unknown to the public prior to his failure to respond to a grand jury subpoena. 443 U.S. at 162-163.

There is simply no comparison between these plaintiffs and "Jackie Collins", by her own admission the third best-selling authoress in the United States, who has clearly achieved general fame and notoriety[6] through her efforts to publicize

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6 Petitioner's Complaint affirmatively pleads:

> Plaintiff is a successful writer who has written books and screenplays of international acclaim. *She is a well-known personality who attracts a great deal of public attention as reflected by her numerous radio and television appearances on popular American entertainment and news shows, and by her numerous public relations and promotional tours throughout the United States.* [Second Amended Complaint, at ¶ 19 (emphasis added)]

In a similar case, *Rand v. Hearst Corp.*, 31 A.D.2d 406, 408, 410, 298 N.Y.S.2d 405, 409, 411 (1st Dept. 1969), in which the plaintiff likewise alleged that she was "well known in the contemporary intellectual and literary world [and] among the public at large generally she possesses great fame as a writer," the court unhesitatingly concluded "*[t]hat the plaintiff is a public figure needs no discussion. Her complaint rests on that fact.*"

[*footnote continued on next page*]

not only her books and films, but *herself and her views on a wide variety of topical subjects, including especially and particularly the equal treatment of men and women in films depicting nudity and sexual activity.*

Indeed, petitioner admitted *lobbying in the media* for her views on the latter subject, which could not be more topical in the 1980's, further distinguishing this case from those relied upon by her. There is today, and was in 1980, an on-going public debate in this country concerning both "morality in media" and the role and depiction of women in society in general and in the film and entertainment industry in particular. *See, e.g.*, Wood, "She Sings Lyrics of Affirmation for Women," *The Christian Science Monitor*, September 22, 1980, p. 19:

> The road for women in the arts—despite their visible success in this field—has been at least as bumpy as their road toward equality in employment, education, and male-female relationships. But it has been a less-watched, if no less important, drama.

See, also, Hefner, "Narrowcasting' and the Threat to Morals," *The New York Times*, August 17, 1980, Section Two, p. 29 ("The new home communications industry is on a collision course with the manners and morals Americans have traditionally accepted as appropriate in their homes. When they collide, there is reason to fear a reaction destructive of freedom . . ."); Korry, "Fairfax Studies Proposal to Ban [Nude] Go-Go Dancing, "*The Washington Post*, July 3, 1980,

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[*footnote continued from preceding page*]

(Emphasis added.) *See, also, Atkins v. Friedman*, 49 A.D.2d 852, 374 N.Y.S.2d 11 (1st Dept. 1975) (author of book which sold over 4,000,000 copies is "obviously a public figure").

The New York courts have consistently held "public personalities" who have taken "affirmative steps to attract public attention" to themselves to be public figures for the purpose of Civil Rights Law §§ 50 and 51. *See, e.g., Maule v. NYM Corp.*, 54 N.Y.2d 880, 444 N.Y.S.2d 909 (1981); *James v. Gannett Co.*, 40 N.Y.2d 415, 386 N.Y.S.2d 871 (1976).

p. Va. 13; Nakahaig *The Washington Post*, September 29, 1979, p. B2 (Bridgett Bardot, commenting on nudity in films, "says things have now gone too far."); and Alan, "The Search for the White Knight," *The Washington Post*, April 24, 1979, p. B1 (refusal of actress Jennifer O'Neill to appear nude in films).

The Court of Appeals thus correctly resolved the issue of whether petitioner injected herself into a public controversy, namely, "the propriety of female or male nudity in films and in the print media generally." (26a-27a) Concluding, as the record compelled it to (*see*, RA 1-2), that Collins, "as a controversial, outspoken authoress and screenwriter advocating equal nudity, was . . . a willing participant in this public controversy" (27a), the Court of Appeals accordingly categorized her correctly as at least a "limited purpose public figure" for the purposes of the *Playmen/Adelina* commentary on the emerging freedom of serious actresses to appear nude in films produced for American audiences.[7]

III

Contrary to petitioner's misleading assertion, the Court of Appeals did *not* "ignor[e] the reckless disregard branch" of the *New York Times Co. v. Sullivan* definition of "actual malice" [Petition, at 20], but rather carefully evaluated petitioner's scant "proof" of such alleged reckless disregard and correctly concluded, (i) with respect to the May 1980 issue, that petitioner failed to offer proof sufficient even to impose a duty to inquire on respondent; that the District Court specifically found no "knowing use" under § 51; and that "*there was no proof that any of [respondent's] employees had reason to believe that Chuckleberry (the publisher) would misidentify*" *petitioner*, and (ii) with respect to the June 1980 and January

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7 The correctness of the Court of Appeals conclusion in this regard is only underscored by petitioner's *concession* "[t]hat she has voluntarily chosen to deal with the subject publicly at press conferences. . . ." [Petition, at 15]

1981 issues, "*there is no evidence in the record showing that Flynt Distributing* knew or *recklessly disregarded* whether these editions contained any mention of plaintiff, let alone any factual error concerning her." (32a; emphasis added)[8]

Petitioner nonetheless continues to argue, as she did below, that she adduced sufficient evdience of actual malice to warrant a trial and verdict in her favor. [Petition, at 18] The record belies petitioner's rhetoric, however, and overwhelmingly establishes beyond peradventure of doubt that respondent did *not* act with reckless disregard of whether petitioner was mentioned—falsely or otherwise—in any issue of *Adelina* magazine.

The entire litany of "facts" relied upon by petitioner is nothing more than a recitation of the early history of her original action against PDC and Chuckleberry—an action which *exclusively* challenged only the May 1980 issue of *Adelina*. It is, however, undisputed that respondent had no knowledge of the content of the May 1980 issue, let alone the misdescription of petitioner in it, and did not even purchase PDC's distribution business until several weeks *after* PDC had already completed the national distribution function (the furnishing of a list of wholesalers to the publisher's printer) with respect to the May issue. Moreover, petitioner did not cross-appeal from and is, therefore, now bound by the District Court's express ruling that there is no "knowing use" of petitioner's pseudonym in this issue and that respondent had no knowledge that plaintiff's name or picture would appear in the May 1980 issue. *Duignan v. United States*, 274 U.S. 195 (1927).

Contrary to petitioner's argument that there is no relationship between "knowing use" and "actual malice" [Petition, at

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8 The Court of Appeals analysis of "Actual Malice in this Case" [Section III (c)(2) of the opinion below] is reproduced out of numerical page order in petitioner's appendix, with pages 6173 and 6172 of the Court of Appeals slip opinion reproduced between pages 6170 and 6171, making this section of the opinion difficult to follow in the appendix. *Compare*, 745 F.2d at 140-141.

19-20], the New York courts have repeatedly equated the two concepts, *see*, *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 150, 454 N.Y.S.2d 971, 975 (1982) ("The jury was charged that it could award exemplary damages if it found that defendant 'used plaintiff's picture, knowing that plaintiff had not consented to the use, or in reckless disregard of whether plaintiff had consented to the use.' "); *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499-500, 410 N.Y.S.2d 282, 286 (1978) ("Hallmark was acting either with actual knowledge, or at the very least, with a reckless disregard for the truth of plaintiff's assertions", citing *Time, Inc. v. Hill*).

The artificial distinction which petitioner seeks to draw between "actual malice" and "knowing use" [Petition, at 19-20] is inapposite to a "false light" case such as *Lerman* since here, in sharp contradistinction to the "appropriation" cases relied on by petitioner, inaccuracy and misdescription are inherent in the use by the publisher. Thus, the Court of Appeals was clearly correct in its holding that evidence of "knowing use" by respondent would be identical to proof of "actual malice" and, accordingly, that petitioner's complete failure to prove the former, despite having every incentive to do so, clearly and unequivocally signaled her terminal inability to prove the latter.

It is likewise undisputed that the national distribution dissemination function was complete with respect to the June 1980 issue several weeks prior to the commencement of petitioner's action in the District Court, that respondent had no knowledge or reason to anticipate that petitioner would be referred to in these later issues, and that petitioner did not raise any questions regarding these issues until March 1981, well after the national distribution functions for even the January 1981 issue were complete.

Nor may petitioner argue, as she attempts [Petition, at 18], that respondent rests on mere "professions of good faith." Petitioner called no witnesses at trial with respect to the June 1980 and January 1981 issues (other than to prove that they were, in fact, sold and that each referred to petitioner).

Respondent, on the other hand, called as witnesses (among others), its Distribution Director, its Assistant Treasurer (formerly the Assistant Controller of PDC) and its National Circulation Director, who testified *without contradiction* that the responsible employees of respondent had no role in the distribution of the May and June 1980 issues and no personal knowledge of petitioner, let alone advance notice of the contents of the magazine in general, much less the subscription solicitation pages in particular. Furthermore, respondent's expert witness, an industry consultant, clearly established that respondent would have had no prior knowledge of the content of each issue of *Adelina*.

Petitioner called no witnesses to offset this clear testimony, but instead relies on PDC attorney Stephen Stern's April 11, 1980 letter to respondent. This letter did *not* "demand" indemnity by respondent, but, to the contrary, requested respondent's "thinking" as to which entity (i.e., respondent or PDC) was contractually obligated to defend against petitioner's complaint. *Compare* Petition, at 17-18, *with* 91a. The Stern letter is, in any event, wholly irrelevant to the decisive issue of *whether* respondent's employees "having responsibility for the [distribution] of the June 1980 and May 1981 issues had the requisite state of mind, *New York Times v. Sullivan*, 376 U.S. 254 (1963), at 287, and "entertained serious doubts" as to whether the June and January issues referred to petitioner and then, in spite of their state of mind, sent the galley of wholesalers to the publisher's printers. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In this case the evidence is *uncontroverted* that the May and June 1980 wholesaler lists had already been sent to the printer prior to the commencement of petitioner's action and no responsible employee of respondent (four of whom testified at the trial) knew or had any reason to anticipate that petitioner would be referred to in either the June 1980 or January 1981 issues of *Adelina*, or entertained any "doubt", "serious" or otherwise. Accordingly, petitioner's inclusion of the Stern letter in her appendix as her key proof of "reckless disregard" clearly signals the utter lack of merit in her contentions.

Given these undisputed and indisputable facts and circumstances, there is no question but that petitioner did not and could not prove actual malice by clear and convincing—or any—evidence and, therefore, that a properly instructed jury could not reasonably find for petitioner. For this reason, the Court of Appeals correctly reviewed and independently scrutinized the record, and thereupon dismissed petitioner's complaint. *Bose Corp. v. Consumers Union of United States*, ____ U.S. ____, 104 S.Ct. 1949 (1984).

Nor may petitioner belatedly argue in this Court, *for the first time*, that there is additional evidence, *not disclosed in her certiorari petition or to the Court of Appeals below*, which she should be permitted to pursue by way of additional discovery or introduce at a retrial. Simply put, certiorari is not a substitute for a motion for a new trial. Petitioner argued in the Court of Appeals that the record as a whole established statutory "knowing use" and constitutional "actual malice", and she maintained that posture in her petition for rehearing in banc. Her certiorari petition nevertheless inconsistently attempts to argue that she requires a new trial in order to prove her case. Her petition is silent, however, as to what further or additional evidence is to be discovered or introduced into the record, and it is abundantly clear that petitioner, in fact, has had a full and complete opportunity to make a record of respondent's alleged culpable acts and omissions, but has simply failed to prove actual malice by clear and convincing (or any other) proof.

IV

As petitioner clearly failed to meet the New York "gross irresponsibility" standard for Civil Rights Law §§ 50, 51 liability to private parties enuciated in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64, (1975), and as petitioner's claim for compensatory damages is, in any event, now barred by the $100,000 settlement she accepted and was paid by PDC, there are clearly independent and adequate grounds under New York law re-

quiring dismissal of petitioner's Complaint; hence, certiorari would be improvident and the petition should be denied. *Zacchini, supra,* 433 U.S. at 566; *Wilson v. Loew's, Inc.,* 355 U.S. 597 (1958); *Herb v. Pitcairn,* 324 U.S. 117 (1945).

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), this Court concluded that in the case of private individuals involved in a matter of general public interest, but not a particular controversy, the States should be accorded substantial latitude in fashioning a defamation remedy against media defendants based on "fault". Subsequently, the New York Court of Appeals expressly fashioned such a remedy in *Chapadeau, supra*:

> "We now hold that within the limits imposed by the Supreme Court where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover; however, to warrant such recovery he must establish, by a preponderence of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

Assuming, *arguendo*, that petitioner is not a limited purpose public figure, as found and held by the Court of Appeals, petitioner's own view of this case brings her squarely within the *Chapadeau* rule, requiring her to have at least established, by a preponderance of the evidence, that respondent, a distributor (i.e., *not* a publisher), "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible [national distributors]."

Petitioner, however, clearly failed to meet even this alternative standard for recovery. The District Court itself concluded that respondent had no knowledge with respect to the May 1980 issue, nor any reason to know of the content of that issue,

let alone of the reference to petitioner, an obvious conclusion supported by the fact that petitioner did not even purchase PDC's distribution business until mid-March, 1980, well after PDC had already completed the national distribution function for the May issue. Moreover, in accordance with industry standards, PDC had no knowledge of the content of the May issue, nor could it be expected to have such knowledge.

The same analysis clearly applies to the June 1980 issue, which was shipped by Chuckleberry's printer on March 24, 1980, the same day Lerman commenced her action with respect to the May issue. Again, the national distribution function—the furnishing of the wholesaler list to the printer—was complete well before both respondent's purchase of PDC's business and the commencement of petitioner's action, and neither petitioner nor PDC acted inconsistently with industry standards, let alone "in a grossly irresponsible manner"—the *Chapadeau* standard.

Similarly, petitioner utterly failed to prove any departure from industry standards, and certainly not gross irresponsibility, with respect to the January 1981 issue. Respondent's expert testified unequivocally at trial that the national distributor is not customarily provided with a copy of the magazine prior to shipment, and petitioner neither cross-examined respondent's expert with respect to this testimony nor introduced any evidence of her own as to "the standards of information gathering and dissemination ordinarily followed by responsible parties" which she claims were not observed in this case, relying instead on her theory of the case to the effect that once respondent was aware of petitioner's complaint with respect to the May 1980 issue, it was "on notice" to police all future issues of *Adelina* magazine for incidental references to petitioner. Petitioner, however, had never heretofore, and does not presently support this *ipse dixit,* which is contrary to the evidence and was correctly rejected by the Court of Appeals.

Moreover, respondent is a *merchandiser, not* a "publisher." To impose liability on respondent, which has no control over

or advance notice of content, "would subject such merchandiser to hazards over which it has no control, and impose upon it a burden disproportionate to the interest to be protected." *Brinkley v. Casablancas,* 80 A.D.2d 428, 444, 438 N.Y.S.2d 1004, 1014 (1st Dept. 1981) (construing and applying New York Civil Rights Law §§ 50 and 51).

Furthermore, New York has and continues to narrowly construe and to engraft exceptions onto Civil Rights Law §§ 50, 51 in order to protect the liberty of speech and press under the New York Constitution, Article 1, § 8, as a matter of New York public policy, *not* federal constitutional law.[9] *See, Arrington, supra* (explicit reference to State constitutional values) and *Rand v. Hearst Corp, supra*, 31 A.D. 2d at 408, 298 N.Y.S. 2d at 409:

> The history and purposes of sections 50 and 51 of the Civil Rights Law have been the subject of much discussion . . . It is sufficient for our purposes to say that the sections and the law were designed to protect an individual against 'selfish, commercial exploitation' . . ..
>
> The law—narrowly written—attempts to do so by proscribing the use of the person's name or picture for the purpose of trade or advertising. However, it has already been clearly established that no in every instance where a person's picture or name is used . . . will a violation of the statute be found. . . .
>
> Thus, in construing the law, the courts have looked to its underlying purpose . . . the protection of an individual's right of privacy. *They [i.e., the words 'advertising purposes' and 'purposes of trade'] must be construed narrowly and not used to curtail the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment*

9 Broader than the Federal Constitution, the New York free press clause (RA-10) expressly requires "abuse" of the right to publish freely as a constitutional threshhold requirement to the imposition of liability. Simply put, there was no such "abuse" in this case.

on matters in which the public has an interest or the right to be informed . . .. As stated by the Court of Appeals in *Spahn*, and quoted with approval by the United States Supreme Court in *Time, Inc. v. Hill* . . . 'ever mindful that the written word or picture is involved, *courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.*' . . .

It is quite apparent, therefore, that books and publications have a special position in the law. . . . *'[P]ublishing, though a business*, stands on a somewhat different plan than many other businesses in that freedom of the press is often involved.' Therefore, in considering books and publications, courts must take a broad view of what may or may not be written and what may or may not be said about books and their authors.

The right to publish factual matter of interest to the public was recently considered in the case of *Time, Inc. v Hill* (*supra*), where the United States Supreme Court held that there was no action under the New York privacy statute in the absence of proof that the matter was published with knowledge of its falsity, or with reckless disregard of the truth. Hence, the courts have been careful to interpret the right of privacy statutes in such manner as would permit the free flow of information. . . .

Consequently, it is not sufficient to show merely, as plaintiff does here, that the acts complained of come within the four (4) corners of the words used in the statute. [Emphasis added.]

Finally, it is clear that petitioner's claim for compensatory damages is barred by her $100,000 settlement with PDC. Petitioner has not sought certiorari with respect to the Court of Appeals' unequivocal holding that she failed to prove substan-

tial damages and it is clear from the opinon below that, even assuming she were granted a new trial, no award in her favor in excess of the amount of the PDC settlement could be justified and permitted to stand. In these circumstances, New York General Obligations Law, § 15-103, reproduced *infra*, at RA-10, prohibits a "double recovery" by petitioner and expressly provides that the $100,000 paid to petitioner by PDC "shall be credited" against any award in petitioner's favor against respondent.[10] Thus, petitioner's claim for compensatory damages has been more than satisfied and is *moot*.

CONCLUSION

It is undisputed that the First Amendment applies with equal vigor to *national periodical distributors* as well as publishers, for "liberty of circulating is as essential to that freedom as liberty of publishing, indeed without the circulation the publication would be of little value." *Ex Parte Jackson*, 96 U.S. 727, 733 (1887); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). Yet petitioner would entice this Court into a holding which would propel *national magazine distributors* such as respondent into the role of censoring the contents of the magazines circulated through their distribution chains. Such a holding—the only one which could possibly resuscitate petitioner's claim, which rests exclusively on the alleged failure of respondent to police and censor the contents of *Adelina*—would be directly contrary to the sound and still vital public policy espoused by this Court in *Smith v. California*, 361 U.S. 147, 153 (1959):

> "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." *The King v. Ewart*, 25 N.Z.L.R. 709, 729 (C.A.). And the bookseller's bur-

10 Indeed, any other result under New York law would run afoul of the *Gertz* prohibition against recovery of more than "such damages as are sufficient to compensate . . . for actual injury" absent clear and convincing evidence of constitutional malice. 418 U.S. at 349-350.

> den would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The booksellers limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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David L. Kahn,
William A. Gerber,
Of Counsel.

March 27, 1985

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* In compliance with Supreme Court Rule 28.1, respondent states that it is a wholly owned subsidiary of L.F.P., Inc. and an affiliate of Hustler Magazine, Inc., Gentleman's Companion, Inc., MCA Advertising, Flynt Subscription Company, Flynt Disc, and Hustler Productions, Inc.

APPENDIX

Partial List of Press Materials and Digest of Articles About Jackie Collins Appearing in Celebrity and Gossip Column Sections of Newspapers and Magazines Throughout the United States

Press release prepared by Grosset & Dunlop entitled "Jackie Collins"; Suggested questions for Jackie Collins (for media interviews); Press release biography of Jackie Collins; Article from *World Times* (1978) entitled "Big Money and Low Life in the Pop World"; Press release from Marilyn Beck's Hollywood/Show Business in the News; Article from *Variety* entitled "Novelist Jackie Collins Aims at 'Total Control' of Her Future Pix; Article from the *Sunday Daily News*, September 30, 1979, entitled "Some Of My Best Friends Are Men"; Article from the *New York Post* entitled "Last Night with Martin Burden"—headline: "Equal Nudes for All", September 1979; Article from *The Hollywood Reporter*, November 1, 1979; Article from the *Detroit Free Press*, September 25, 1979; Article entitled "New York Callings"; Article from *The Record*; Hackensack, New Jersey; Article from the *Standard Star*, New Rochelle, N.Y., September 23, 1979; Liz Smith Comments, from the *New York Daily News*, September 1979; Article from *Penthouse* magazine (1978) entitled "A View From the Top; Jackie Collins, Joan's Kid Sister"; Article entitled "Jackie, the Girl Who Shocked Tom Jones"; Article from *Los Angeles Herald Examiner* entitled "The Cushing Report; A Double Shot of Collins", September 9, 1979; Article from *San Francisco Examiner* entitled "She Writes Sexy Films for Sister", November 29, 1979; Article from the *Detroit Free Press*, November 4, 1979; Film review from *Variety* of "The World is Full of Married Men"; Article from *The Republican*, September 26, 1979; Article from the *New York Post* entitled "Last Night with Martin Burden"—headline "Quotes and Notes", September, 1979; Article from the *New York Daily News* entitled "Jessica Who?", October 14, 1979; Article entitled "Just for Variety" by Army Archerd; Article from the *New York Post* entitled "Jack Martin's Headliners"—Headline "Martin's Sideliners", November 1979; Article from *The Hol-*

lywood Reporter; Excerpts from book reviews of *Lovers and Gamblers*; Book review from *Houston Chronicle*, October 7, 1979; Book review of *Lovers and Gamblers* entitled "Sexperience, Anglo-American Style"; Article from *Women's World* entitled "Why Am I So Shocking"; Interview in *Titbits* entitled "Stripplets Who Shocked A Pop Star," April 19, 1979; Interview in *Frizz* magazine entitled "Jackie Collins; Article entitled "What Jackie Collins Tells Her Daughters"; Article from *People* magazine entitled "Jackie Says She's A Moralist, But Why Do Her Novels have Titles Like *The Stud*?", August, 1979; Article from the *Chicago Sunday Sun Times* entitled "Jackie Collins Studs Her Stories With Sex" November 25, 1979; Interview in Penthouse *Forum* magazine; Interview in *Ritz* magazine, October 1979; Article from the *Chicago Tribune*, entitled "This Collins' Career is Going Fully Steamy", September 23, 1979; Interview of Jackie Collins by Fred Robbins; Collin's publicity schedule for Cleveland and Chicago, September 11, 1979; Publicity schedule for Chicago, September 14, 1979; Memorandum from Solsters & Roskin; Publicity list for 1979 tour.

Text of Article Complained of, Published in "Archives" Section of May, 1980 Issue of Adelina Magazine, at Page 117

A woman's ability to communicate sexuality on film is a unique talent, one which many beautiful actresses do not possess. Beauty alone is not enough; the sensuality must come from within, controlling subtle actions—nuances of body movements, facial expressions, even voice inflections.

Throughout the history of film, the most successful actresses have had the quality of "reaching out" to the male, of giving his fantasies a form and substance they could never have attained without the near-reality created by film images.

As recently as the late 1960's, nudity and the honest depiction of sex were all but unknown. A nude man and woman, in bed, kissing, touching, engaging in foreplay or simulating the motions of sexual intercourse? Forbidden in all but the mildest forms, for a few seconds, then fadeout. Only in foreign films were more explicit sexual activities shown, and they were heavily censored before release in America. Or two versions of such scenes were filmed, one for European audiences, another for American.

Eventually, inevitably, following favorable court decisions in cases involving films considered to be pornographic but having what was called "socially redeeming value," America's legitimate filmmakers became more daring in their portrayal of sex and nudity.

A ratings system was devised to protect the young and squeamish from films whose sexual content was deemed explicit, or in which there was nudity. European films were shown uncensored in their original versions.

With this "coming of age" of American filmmaking—and American audiences—actresses were given the opportunity to free their natural ability to express sexuality. And even those actresses whose sexuality had only been hinted at, which was more latent than expressed, was released, often from the most unexpected of them—the world-famous, formerly known only for their purely "dramatic" talents; those whose previous roles had been of "demure" types; older actresses, whose more

mature and self-confident sexuality was at least as exciting as that of younger actresses; and those not known for their beauty but whose inner sensuality overcame the lack of physical attractiveness.

Today, there are few actresses who will reject a role because it requires nudity. On these pages, the pleasing result of this liberated attitude.

June, 1980 Publisher's Subscription Solicitation Page (Page 99 of June, 1980 Issue of *Adelina* Magazine) for which Petitioner was Awarded $1.2 Million in Compensatory and $1 Million in Punitive Damages Against FDC

"I ALREADY MISSED SEVERAL ISSUES OF THE BEAUTIFUL ADELINA!"

You did? Well, that's no problem. We happen to have a few copies of each issue left which we are holding in case some of you want to find out what you missed. Just fill out the order coupon below. And you'd better subscribe, too—so you won't miss any more issues of ADELINA. There, that wasn't hard, was it?

"I DON'T WANT TO MISS ONE ISSUE OF THE BEAUTIFUL ADELINA!"

You don't? Well, that's easy enough to take care of. You've got life insurance, car insurance, fire insurance and maybe even homeowners' insurance—so why not get some ADELINA insurance? Subscribe today and insure that you won't miss the best new men's magazine of the 1980s.

MAIL TO:
ADELINA BACK ISSUES
Suite 1502, 527 Madison Avenue, New York, NY 10022

YES, I WANT THESE BACK ISSUES:
(Send $3.25 per issue—includes postage and handling)

☐ No. 1 (Jan 80) ☐ No. 2 (Feb 80) ☐ No. 3 (Apr 80) ☐ No. 4 (May 80)
☐ No. 5 (Jun 80) ☐ No. 6 (Jul 80) ☐ No. 7 (Aug 80) ☐ No. 8 (Sept 80)
☐ No. 9 (Nov 80) TOTAL $_____

Yes, I want ADELINA insurance. Start my subscription with the next issue.
_____ 12 issues (regular newsstand price $35.40) PA ONLY $26
_____ 24 issues (regular newsstand price $70.80) PA ONLY $50
GRAND TOTAL $_____

_____Check or money order enclosed _____BankAmericard _____MasterCard
Acct # _____ Expiration date _____
Interbank # _____
name _____
address _____
city _____ state _____ zip _____
AD-1-81

BEST AVAILABLE COPY

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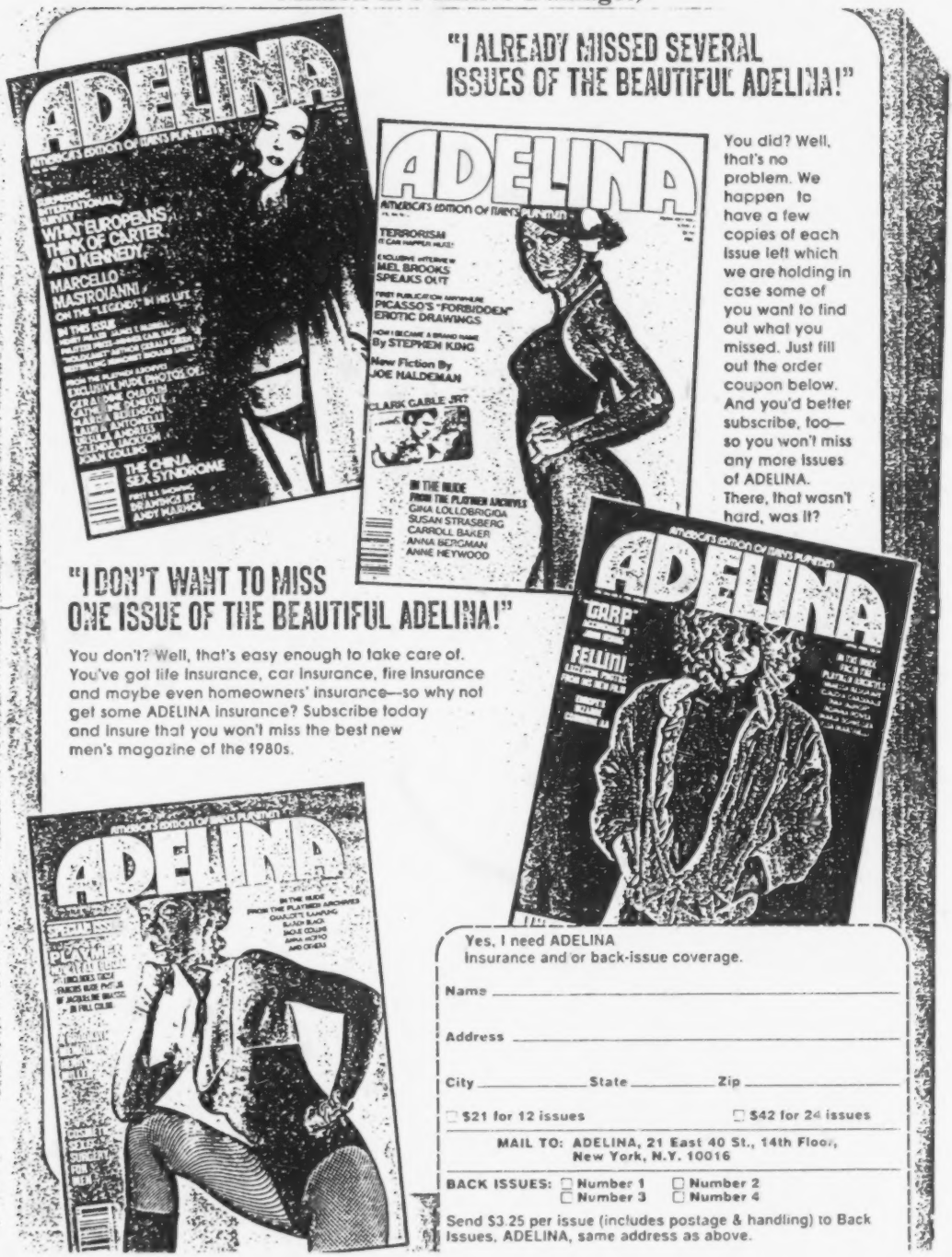
January, 1981 Publisher's Subscription Solicitation Page (Page 98 of January, 1981 Issue of *Adelina* Magazine) for which Petitioner was Awarded $5 Million in Compensatory and $32 Million in Punitive Damages Against FDC (Remitted to $2 Million in Punitive Damages)


"I ALREADY MISSED SEVERAL ISSUES OF THE BEAUTIFUL ADELINA!"
ADELINA
AMERICA'S EDITION OF PLAYMEN
WHAT EUROPEANS THINK OF CARTER AND KENNEDY
MARCELLO MASTROIANNI ON THE "LEGENDS" IN HIS LIFE
THE CHINA SEX SYNDROME
TERRORISM
MEL BROOKS SPEAKS OUT
PICASSO'S "FORBIDDEN" EROTIC DRAWINGS
By STEPHEN KING
New Fiction By JOE HALDEMAN
CLARK GABLE, JR.?
IN THE NUDE FROM THE PLAYMEN ARCHIVES
GINA LOLLOBRIGIDA
SUSAN STRASBERG
CARROLL BAKER
ANNA BERGMAN
ANNE HEYWOOD
You did? Well, that's no problem. We happen to have a few copies of each issue left which we are holding in case some of you want to find out what you missed. Just fill out the order coupon below. And you'd better subscribe, too—so you won't miss any more issues of ADELINA. There, that wasn't hard, was it?
"I DON'T WANT TO MISS ONE ISSUE OF THE BEAUTIFUL ADELINA!"
You don't? Well, that's easy enough to take care of. You've got life insurance, car insurance, fire insurance and maybe even homeowners' insurance—so why not get some ADELINA insurance? Subscribe today and insure that you won't miss the best new men's magazine of the 1980s.
CARP
FELLINI
Yes, I need ADELINA insurance and/or back-issue coverage.
Name
Address
City State Zip
$21 for 12 issues
$42 for 24 issues
MAIL TO: ADELINA, 21 East 40 St., 14th Floor, New York, N.Y. 10016
BACK ISSUES: Number 1 Number 2 Number 3 Number 4
Send $3.25 per issue (includes postage & handling) to Back Issues, ADELINA, same address as above.

Petitioner's "Supplementary Proposed Jury Instruction" with Respect to Malice (Submitted June 16, 1983—The Fourth Day of Trial)

* * * Punitive damages are appropriate if you find that Flynt acted maliciously or recklessly in using her name for advertising purposes. In reaching your determination on whether defendant distributed the materials complained of maliciously or recklessly, you should determine whether these materials were distributed in good faith. A defendant's testimony that he acted in good faith is not conclusive as to that issue. You must decide in light of all the surrounding circumstances whether defendant indeed acted in good faith. The circumstances you may consider in assessing punitive damages include whether or not Flynt was previously put on notice or otherwise warned about using her name and whether or not Flynt disobeyed this Court's order requiring it to retrieve the magazines from the channel of distribution.

Dated: New York, New York
June 15, 1983

Respectfully submitted,

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Excerpt From Transcript of Oral Argument in the United States Court of Appeals (January 30, 1984)

JUDGE CARDAMONE: How do you distinguish this case from the rationale of Time v. Hill?

MR. DAICHMAN: Let me go through an illustration which I think will demonstrate the accommodation of the First Amendment values to Section 51, and let me start with the facts of the Arrington case, which is a Court of Appeals New York case. In that case they took a photograph of a black professional and they used it on the cover of the New York Magazine to illustrate an article on the black middle class. There was no action under Section 51 because his photograph was related to the subject matter of the article. But let me change that fact a little and let us say that the article on the black middle class fictionalized the commentary about Mr. Arrington and said that he had become educated and he turned his back on the ghettos and he left people less fortunate than himself for the affluent suburbs. Now we fictionalize but we still have a connection between Mr. Arrington who is a black middle-class professional and the article on the middle class. That fictionalization would invoke the Time v. Hill rule of constitutional malice.

A third and final example is: You take Mr. Arrington's picture, you put it on the cover of a magazine, and you have a story about dope rings and dope peddling in New York City. If Mr. Arrington has nothing to do with that, that is a commercial use, it is a trade function, under Section 51. That is exactly what the Davis court said, which they cite in their brief. The Davis court said: When the plaintiff's photograph is used as an illustration in an article on illicit drug dealing, with which in fact the plaintiff has no connection, the use may be considered as one for trade, citing a case called Thompson v. Close-Up.

[Transcript, page 26, line 12, through page 27, line 18.]

New York State Constitution, Article 1, § 8

§ 8. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

New York General Obligations Law § 15-103

§ 15-103. Consideration to be credited to co-obligor

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor giving the consideration did not stand in the relation of a surety.